No. 20

IN THE

Supreme Court of the United States

October Term, 1961

DEAN RUSK, Secretary of State,
Appellant,

v.

JOSEPH HENRY CORT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE

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Citations

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Opinion Below

The opinion of the three-judge district court (R. 32-39) is reported at 187 F. Supp. 683.

Jurisdiction

The judgment of the district court, holding Section 349(a)(10) of the Immigration and Nationality Act of 1952, *infra*, pp. 2-3, unconstitutional, declaring that appellee is a citizen of the United States, and enjoining the Secretary of State from denying him a passport on the ground that he is not a citizen, was entered on October 25, 1960 (R. 40-41). Notice of appeal to this Court was filed in the district court on November 1, 1960 (R. 42-44). On February 20, 1961, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (R. 49), 365 U. S. 808.

Questions Presented

1. Whether the district court has jurisdiction of this action for a declaratory judgment of United States nationality, the issuance of a passport and other injunctive relief under Sections 11-305 and 11-306 of the District of Columbia Code, Sections 2201 and 2202 of the Declaratory Judgment Act, and Sections 10 and 12 of the Administrative Procedure Act.

2. Whether Congress has the constitutional power to provide, as it did in Section 349(a)(10) of the Immigration and Nationality Act of 1952, for the expatriation of a native-born citizen on the ground of remaining outside the jurisdiction of the United States for the purpose of evading service in the armed forces of the United States.

3. Whether Section 349(a)(10) violates the Fifth Amendment in authorizing an administrative agency to adjudicate the loss of citizenship as punishment for criminal conduct without giving the accused person his constitutional rights of grand jury indictment, trial by jury, and acquittal in the absence of compliance with standards of criminal justice.

4. Whether Section 349(a)(10) as written and applied violates the Fifth Amendment because of vagueness as to the adjudicating tribunal, the grounds of expatriation and because of an unreasonable statutory presumption.

Statutes Involved

1. Section 349(a)(10) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 267-268, provides as follows:

> Sec. 349(a)(10) [66 Stat. 267-268]:
>
> (a) From and after the effective date of this Chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> • • •

(10) departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States. For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States.

2. District of Columbia Code, Sections 11-305 and 11-306, read as follows:

§ 11-305. Jurisdiction-Powers of District Courts conferred.

The United States District Court for the District of Columbia, in addition to its jurisdiction as a United States district court, shall continue to have and exercise all the jurisdiction possessed and exercised by it on August 31, 1948.

11-306. General jurisdiction.

Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States.

3. The Declaratory Judgment Act, 28 U. S. C. §§ 2201, 2202, reads as follows:

2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any

court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

§ 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

4. Sections 10 and 12 of the Administrative Procedure Act, 5 U. S. C. §§ 1009, 1011, read in pertinent part as follows:

Section 10. Judicial review.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction * * *.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review * * *.

* * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; * * *.

Construction and Effect

Section 12 * * * No subsequent legislation shall be held to supersede or modify the provision of this chapter except to the extent that such legislation shall do so expressly * * *.

Appellant has printed Section 360 of the Immigration and Nationality Act of 1952, 66 Stat. 163, 273-274, and its predecessor, Section 503 of the Nationality Act of 1940, 50 Stat. 1137, 1171-1172 at pages 3-6 of his brief.

Statement

The appellee is an American citizen by birth and without any other nationality (R. 1, 33). He initiated this action in the District Court for the District of Columbia against the Secretary of State seeking declaratory and injunctive relief overturning the State Department's denial of his application for an American passport on the ground that he had lost his citizenship, under Section 349(a)(10) of the Immigration and Nationality Act of 1952, *supra*, pages 2-3, by remaining outside the United States during a period of national emergency for the purpose of evading or avoiding service in the armed forces of the United States. In his complaint, appellee alleged, *inter alia*, that he had not remained abroad to avoid his military obligation, and that Section 349(a)(10) was unconstitutional (R. 1-6).

Appellee is a physician and research physiologist, residing with his wife and their two infant children, all American

citizens, in Prague, Czechoslovakia, where he is employed at the Institute for Cardiovascular Research (R. 1, 55).

On May 29, 1951, appellee left the United States for the sole purpose of carrying out the terms of a fellowship given by the National Foundation for Infantile Paralysis, Inc., an American corporation, for work to be performed by him at the Department of Experimental Medicine, University of Cambridge, England (R. 2). Prior to his departure, appellee had registered on May 25, 1951, under and prior to the effective date of the Doctor's Draft Act, 64 Stat. 826, 50 App. U. S. C. § 454 *et seq.*, after having been advised by his Draft Board and University Draft Advisor that he could take up the said position (R. 2).

Appellee assumed his duties at the University of Cambridge where he was employed from 1951 to 1953. (*ibid*) Thereafter, from 1953 to 1954, he was employed at the Medical School at the University of Birmingham in England. (Ibid)

On November 28, 1951, and thereafter, the American Embassy in London demanded that appellee surrender his passport and return immediately to the United States (R. 2, 53, 72-74). This demand was made pursuant to Department of State policies which were subsequently embodied in the regulations declared invalid by this Court in *Kent & Briehl* v. *Dulles*, 357 U. S. 116.

On September 14, 1953, a Massachusetts Draft Board ordered appellee to report for induction into the armed forces (R. 2). Appellee did not appear for induction, being of the opinion that the order was not issued in good faith to secure his military services, that his political associations and physical disabilities made him ineligible for military service, and that he was being ordered back to the United States to be served with a Congressional Committee subpoena or otherwise made the subject of governmental sanctions by reason of his political associations (R. 2, 3, 72-74).

The British Home Secretary refused to renew appellee's English residence permit because the United States Government sought his expulsion (R. 3, 55). Thereupon, appellee sought employment in Israel and in India, and he accepted the first formal offer—from Czechoslovakia (R. 3, 55).

On December 17, 1954, appellee was indicted by a grand jury in the United States District Court for the District of Massachusetts on the charge of having failed to comply with the order of September 14, 1953 (R. 75). The indictment is now pending (R. 70).

The complaint and the supporting affidavit herein allege that appellee departed from the United States solely for purposes of securing employment, and remained abroad solely for that purpose (R. 3, 52). They also allege that he did not depart from or remain outside of the United States for the purpose of evading or avoiding training and service in the military, air or naval forces of the United States (R. 3, 54, 92, 95). This statement is supported by an affidavit of the American Consul in Prague to the effect that:

> "Without evidence to the contrary, the Consular officer has no reason to doubt Dr. Cort's statements made in the attached affidavit which purports to answer the charge that he departed from and remained outside the jurisdiction of the United States for the purpose of evading or avoiding training and service in the armed forces of the United States." (R. 58, 89)

This statement was made by the American Consul in connection with an application for a passport filed by the appellee in Prague in order that he might return to the United States with his wife and children to fulfill his obligations under the Selective Service Laws, and to secure medical treatment for his wife's illness, diagnosed as multiple-sclerosis (R. 56-57).

It is the policy of the Department of Justice to accept a delinquent's belated compliance with his obligations under the Selective Service Laws (R. 56). The details of appellee's

efforts in this direction, including meetings between his counsel and representatives of the Department of Justice, Public Health Service and Selective Service Administration are set forth in appellee's affidavit and in the exhibits annexed thereto (R. 50-71).

On October 15, 1959, the Passport Office of the Department of State made an administrative determination, without a hearing, that appellee had expatriated himself under the provisions of Section 349(a)(10) and denied his application for a passport (R. 93). On October 28, 1959, a hearing was held before the State Department's Board of Review on the Loss of Nationality. No evidence was offered by the Department to show that appellee had departed from or remained outside the jurisdiction "for the purpose of evading or avoiding training and service in the military, air or naval forces of the United States", although it subsequently drew that conclusion from correspondence between appellee and others (R. 103-107). On February 10, 1960, the Board affirmed the decision of the Passport Office (R. 100).

This action was, under the regulations, the "final administrative determination" of the State Department, leaving the appellee without further administrative remedy. Appellant accordingly instituted this action "under D. C. Code, sections 11-305 and 11-306; 28 U. S. Code, sections 1331 and 2201; and section 10 of the Administrative Procedure Act, 5 U. S. Code, section 1009" (R. 1). The complaint also requested the convening of a three-judge court under 28 U. S. C. §§ 2282 and 2284 since "one of the purposes of this action is to enjoin the enforcement and execution of certain acts of Congress for repugnance to the Constitution" (R. 1).

Appellant's motion to dismiss on jurisdictional grounds was denied by District Judge Matthews (R. 18). After a three-judge District Court had been convened under 28 U. S. C. 2282 (R. 12), it likewise held that it had jurisdiction, declared § 349(a)(10) unconstitutional, and granted appellee's motion by summary judgment (R. 32-39).

SUMMARY OF ARGUMENT

Introduction

Appellant asks this Court to declare for the first time in its history that a native-born American citizen can be deprived of his nationality and rendered stateless as punishment for crime. In addition, the appellant, to prevail, must persuade this Court to change its recent decision in *Trop* v. *Dulles*, 356 U. S. 86, which held invalid a statutory provision relating to desertion from the Armed Forces with the identical origin and purpose as the draft evasion provision involved herein.

Appellant also asks this Court to make four further inroads into the constitutional rights of the citizen: to hold (1) that a person born in the United States can be deprived of citizenship by an administrative agency's determination of criminal behavior; (2) that this can be based upon a statutory presumption of guilt instead of clear unequivocal proof; (3) that he can be prevented from using the normally available judicial channels of a declaratory judgment action, and (4) that although born a United States citizen, he can be compelled to seek entry into the United States subject to all the disabilities of an alien.

Appellant's position on this last issue appears to be contrary to statutory language, legislative history and judicial authority. However, we address ourselves to it first, in the interests of orderly procedure, since appellant has done so.

I

The Court below correctly held that "the complaint in this case presents a controversy to which the judicial power extends under the Constitution, and . . . authority to hear and determine it has been conferred upon the District

Court by the Declaratory Judgment Act and the Administrative Procedure Act" (R. 35). It held that the language of Section 360 of the Immigration & Nationality Act of 1952 "shows no intention to provide an exclusive remedy, or any remedy" for those not adopting its procedures, and that neither its language or legislative history required a denial of "existing remedies" to such persons (R. 35).

The District of Columbia Code confers a common law and equity jurisdiction upon the District Court. The Declaratory Judgment Act, 2 U. S. C. §§ 2201, 2202, authorizes the District Court to grant declaratory judgments whether or not further relief is sought. Both these statutes were upheld as the basis for a suit against the Secretary of State to enjoin the refusal of a passport on the ground of loss of citizenship. *Perkins* v. *Elg*, 307 U. S. 325.

Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009, grants "any person suffering legal wrong because of any agency action" a right to judicial review "thereof". It authorizes review of "every final agency action for which there is no other adequate remedy in any court". That statute as well as the other two cited have been repeatedly construed by the courts in the District of Columbia to authorize suits of the present type by non-resident claimants. *Frank* v. *Rogers*, 253 F. 2d 889 and other cases cited *infra*, p. 19.

In view of the breadth of the Declaratory Judgment Act, appellant errs in suggesting that Section 503 of the Nationality Act of 1940 was passed for the purpose of giving non-resident citizenship claimants a cause of action which they did not possess (Gov. Br. 131). The Declaratory Judgment Act has never been restricted to residents. See *e.g.*, *Stewart* v. *Dulles*, 248 F. 2d 602; *Bauer* v. *Acheson*, 106 F. Supp 445 (D. C. D. C., 1952).

Section 503 was merely intended to give a right to enter the United States. The Government's spokesman, in two Committee hearings on the bill which became Section 503,

assumed that an action for declaratory judgment existed under the Declaratory Judgment Act. The discussion in the hearings centered about the *pros* and *cons* of right of entry, not the right of suit.

Section 503 was replaced by Section 360 of the Immigration and Nationality Act of 1952 because Section 503 permitted entries which were fraudulent as to the entrant's identity. Hence, Section 360 set up an elaborate screening device. That it dealt with entry, not causes of action, is shown conclusively by its explicit limitation to certain categories of citizen claimants. Congress could not have intended that other categories were to be deprived of all remedy. It is doubtful that such an intention could have been constitutionally effectuated.

Further, Section 2 of the Administrative Procedure Act (5 U. S. C. § 1011) passed in 1946 provides that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly." Since the 1952 statute contains no such express supersession or modification, appellee's rights under the Administrative Procedure Act remain unaffected. This Court has given great weight to this unusual legislative provision. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48; *Marcello* v. *Bonds*, 349 U. S. 302, 319; *Brownell* v. *We Shung*, 352 U. S. 180.

Appellant's construction of Section 360 so as to deprive the District Court of jurisdiction would make the section unconstitutional. Judicial review of the constitutionality of legislation cannot be prevented by legislation. *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52. In the instant case the District Court declared unconstitutional Section 349(a)(10) of the Act. Appellant would avoid this result by (a) withdrawing the general jurisdiction of the District Court to review action taken under the statute, (b) requiring as a condition of access to any court that appellee seek a certificate of identity, attempt

to litigate his right to the certificate if it is denied and then enter the United States as an alien. These requirements, totally without practical justification, would make litigation burdensome if not impossible and would themselves be void. Certainly, no such intention should be ascribed to the Congress.

II

The Court below correctly held that this Court's decision in *Trop* v. *Dulles*, 356 U. S. 86 compelled the conclusion that Section 349(a)(10) was unconstitutional. In *Trop*, this Court held that Congress did not have the power to punish wartime desertion by loss of citizenship. It declared that §401(g) of the National Act of 1940 (now § 349(a)(8) of the Immigration and Nationality Act of 1952) was a penal law. Four members of the Court concluded that the deprivation of citizenship as a punishment was barred by the Eighth Amendment. One member, Mr. Justice Brennan, concluded that the punishment was unreasonable because of its harshness, the possibility of statelessness, and the availability of alternative means of punishment. The same and additional considerations must lead to the same result in the instant case.

The draft evasion provisions involved here and the desertion provision involved in *Trop* had a common origin and purpose. "Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft law violations seriously threatened the effectiveness of the Union armies." (Mr. Justice Brennan, concurring in *Trop*, at page 107). The Chief Justice's opinion agreed on the similarity of the two sections (*Trop*, 356 U. S. at 93-94); even the Government once regarded their purpose as the same (Gov't Br., *in Perez* v. *Brownell*, 356 U. S. 44).

Now, in the light of *Trop*, appellant seeks to distinguish the draft evasion provision on the ground that it requires departure from the United States. This requirement does not indicate that foreign relations are affected; it was intended, as appellant elsewhere admits, to penalize one immune from other criminal prosecution. Indeed, the 1865 statute punished the draft evader who traveled merely to another district; and the current statute makes no mention of presence in a foreign country.

Appellant's attempt to assimilate this case to that of *Perez* v. *Brownell*, 356 U. S. 44, involving voting in foreign elections, is not supported by the legislative history of Section 349 (a)(10), by the language of the section, or by the reasoning in *Perez*. The draft evasion and desertion provisions appear first in a Civil War statute whose title, content and legislative history relate exclusively, to the maintenance of an army. Act of March 3, 1865, 13 Stat. 487, 490, Sec. 21. Our Government's concern for the impressment of naturalized Americans into military service by their former countries resulted in the Expatriation Act of 1868, 15 Stat. 223, not the parent of the statute involved herein. There was no comparable dispute with foreign countries over Americans going abroad to avoid military service in the United States.

The Revised Statutes of 1878, §§ 1996, 1998, likewise treat draft evaders and deserters together by imposing "penalties and forfeitures". The same provisions appear together in the Act of August 2, 1912, 37 Stat. 356, which amends the Revised Statutes by authorizing the President to remit the loss of citizenship under certain circumstances; this is further proof that punishment was involved.

The draft evasion provision appears next in the 1944 amendment, 58 Stat. 746, to the Nationality Act of 1940, at the Attorney General's suggestion, for the explicit pur-

pose of punishing draft evaders and aiding the war effort. H. Rep. 1229, 78 Cong. 2d Sess., 2-3.

No decision of this Court supports appellant's further claim of an inherent sovereign power to terminate nationality independent of a specific power over foreign relations. That concept is alien to Anglo-American law. Appellant would have the Court, for the first time in its history, deprive an American-born citizen of his citizenship and make him stateless. The significance of citizenship, and the consequences of statelessness, are too fundamental to be shunted off by a reference to "problems to be solved by the political branches of the federal government, if they can and desire to do so". (Gov't Br. p. 55).

III

The adjudication of nationality loss was made by an administrative agency, the Board of Nationality Review of the Department of State. Such an adjudication and penalty contravene due process. The parent statute was held constitutional only because the courts were able to interpolate into the statute the necessity for a trial and conviction upon a charge of desertion as a condition precedent to expatriation. *Huber* v. *Reilly*, 53 Pa. Stat. 112, *Kurtz* v. *Moffitt*, 115 U. S. 487.

This interpolation is not possible here since provision for court-martial adjudication of desertion stands in sharp contrast to the loss here upon a departmental decision. The constitutionality of this device was questioned by the Court in its *obiter dicta* in *Trop*, 356 U. S. 94, Mr. Justice Brennan concurring, 356 U. S. 107-119.

The suggestion of the Government in No. 19 that appellee has available a "de novo trial" (Br. 52) is not sufficient since he has already been deprived of the privileges of citizenship. Further, appellant proposes to deny appellee

any relief by declaratory judgment against the agency that has declared him stateless and not entitled to a passport, and to require him to sue a different government official, against whom he has no complaint, for different relief.

IV

A statute which provides for the adjudication of nationality loss by an unspecified tribunal is unconstitutionally vague. Another similar denial of due process occurs where the tribunal's determination of crime is not based upon specific standards and it is not clear what elements of the offense must be proven and what defenses are available. Further, adjudication is based upon a statutory presumption whose unreasonableness makes it invalid.

ARGUMENT

I

The District Court has jurisdiction under the District of Columbia Code, the Declaratory Judgment Act and the Administrative Procedure Act.

Appellant's consideration of the jurisdictional problem has avoided a discussion of the three statutes recited in the complaint as supporting the jurisdiction of the District Court of the District of Columbia, Sections 11-305, 11-306, Sections 10 and 12 of the Administrative Procedure Act, 5 U. S. C., Sections 1009, 1011, and the Declaratory Judgment Act, 28 U. S. C., Sections 2201, 2202 (R. 1). Indeed, the Administrative Procedure Act is not even mentioned in the appellant's brief.

The Court below held that "the complaint in this case presents a controversy to which the judicial power extends under the Constitution, and that authority to hear and determine it has been conferred upon the District Court by the Declaratory Judgment Act and the Administrative Procedure Act" (R. 35).

In response to the appellant's argument that the appellee was required to proceed under Section 360(b) and (c) of the Immigration and Nationality Act of 1952, the Court succinctly stated:

> "Section 360 may well be thought to provide an exclusive remedy for a person outside of the United States who has sought and obtained a certificate of identity and who has applied for admission to the United States at a port of entry. But we need not determine that question. The language of the section shows no intention to provide an exclusive remedy, or any remedy, for persons outside the United States who have not adopted the procedures outlined in subsections (b) and (c). Neither does the section indicate that such persons are to be denied existing remedies. The legislative history of the section does not require such a construction. *Cf. Frank* v. *Rogers*, 102 U. S. App. D. C. 367, 253 F. 2d 889; *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709 (D. C. D. C.). Subsections (b) and (c) were designed to regulate, not to require, the use of certificates of identity.
>
> "While the plaintiff might have applied for a certificate of identity for the purpose of following the procedure set forth in Section 360, there is nothing in this case to indicate that he ever did or that such a certificate has been issued to him. Instead, he has chosen to bring this action under the Declaratory Judgment Act for a judgment declaring him to be a United States citizen." (R. 35)

The District of Columbia Code confers common law and equity jurisdiction upon the District Court. It authorizes a suit against a cabinet officer to enjoin him

from acting unconstitutionally. *Stark* v. *Wickard*, 321 U. S. 288. It has been upheld in a suit against the Secretary of State to enjoin him from refusing the plaintiff a passport on the ground that she had lost her citizenship. *Perkins* v. *Elg*, 307 U. S. 325.

In addition, Section 10(a) of the Administrative Procedure Act, U. S. C. 1009, grants "any person suffering legal wrong because of any agency action" a right to judicial review "thereof". Section 10(c) confers on the District Court explicit and comprehensive authority to review "every final agency action for which there is no other adequate remedy in any court". In this connection, it is evident that the procedure provided by Section 360 of the Immigration and Nationality Act does not provide an "adequate remedy" for the "final agency action" of the Secretary of State. It does not provide review "thereof", to which plaintiff is expressly entitled under Section 10(a) of the Administrative Procedure Act. It provides for no review of the Secretary of State's actions, but only for review of an exclusion order of the Attorney General, which is not involved in this case.

Section 10(b) of the Administrative Procedure Act authorizes judicial review through "any applicable form of legal action (including actions for declaratory judgment or writs of prohibitory or mandatory injunction * * *)". The reviewing court is charged with the duty to "hold unlawful and set aside agency action, findings and conclusions found to be * * * contrary to constitutional right, power, privilege, or immunity" (Sec. 10(e)). This statute clearly confers a right to judicial review of actions of the Secretary of State based on his adverse determinations of citizenship.

Finally, the Declaratory Judgment Act, 28 U. S .C. Secs. 2201 and 2202, authorizes the District Court to grant declaratory judgments, whether or not further relief is sought. This Court has upheld the use of this Act to review

the Secretary of State's denial of a passport on the ground of loss of citizenship—precisely the sort of action brought by plaintiff in this case, *Perkins* v. *Elg*, *supra*; similarly, see the unanimous decision of the Court of Appeals in the District of Columbia sitting *en banc* in *Stewart* v. *Dulles*, 248 F. 2d 602, 604 involving "a native born American citizen, resident since 1950 in London, England".

It thus appears that even prior to the enactment of the Administrative Procedure Act, review of the Secretary of State's determination of loss of citizenship could be secured in the court below on the basis of the District of Columbia Code and the Declaratory Judgment Act. The Administrative Procedure Act added an additional independent right of judicial review for the "final agency action" of any department—including, of course, the Department of State.

None of these authorities distinguishes between plaintiffs physically present in the United States and those who may be abroad but who still have been the subject of final adverse action by a federal agency.[1] The common law rule is, of course, that a party plaintiff may invoke the aid of a court by appearing through his attorneys, so long as the court has jurisdiction over the subject matter of the suit and the person (or property) of the defendant. See 14 Am. Jur., Courts, Secs. 181, 182; *Stewart* v. *Dulles*, *supra*. A non-resident alien may have access to federal courts under the above statutes, see 2 Am. Jur., Aliens, Sec. 61; *For-*

[1] The Government has elsewhere cited footnote in *Brownell* v. *Tom We Shung*, 352 U. S. 180 (1956), which states, "We do not suggest, of course, that an alien who has never presented himself at the border of this country may avail himself of the declaratory judgment action by bringing the action from abroad." That case concerned the right of an alien not making any claim of citizenship to secure review of an exclusion order. Such a person is not deprived of any rights until *actually excluded*.

benfabriken Bayer A. G. v. *Sterling Drug*, 251 F. 2d 300 (C. A. 3, 1958), *cert. den.*, 346 U. S. 957.

Hence it is that the courts in the District of Columbia have repeatedly construed the Declaratory Judgment Act and the Administrative Procedure Act as authorizing suits of the present type by persons resident abroad claiming to be American citizens.[2] *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709 (D. C. D. C. 1954); *Grauert* v. *Dulles*, 133 F. Supp. 836 (D. C. D. C. 1955), 239 F. 2d 60, *cert. den.* 351 U. S. 917; *Frank* v. *Rogers*, 253 F. 2d 889 (C. A. D. C. 1958); *Bauer* v. *Acheson*, 106 F. Supp. 445; *Guerrieri* v. *Herter*, 186 F. Supp. 588 (D. C. D. C. 1960); *Schneider* v. *Herter*, den. August 17, 1960 (D. C. D. C.) pending on appeal to C. A. D. C.

The appellant, however, argues (1) that the Declaratory Judgment Act of 1934 did not give nonresident citizen claimants a right to sue; (2) that such a right was created by Section 503 of the Nationality Act of 1940; and (3) that the right was then taken away by Section 360 of the Immigration and Nationality Act of 1952, which restricts such claimants to habeas corpus proceedings.

On each of these points, the appellant is in error. First, the Declaratory Judgment Act was not restricted in terms to residents of the United States, nor have non-residents been precluded from suits under that statute and the suits have included claims by citizen claimants for declaratory relief and for a passport, as is the case herein. *Stewart* v. *Dulles*, 248 F. 2d 602 (C. A. D. C. 1950); *Bauer* v. *Acheson*, 106 F. Supp. 445 (D. C. D. C. 1952)

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[2] An action against the head of an administrative agency lies only in the district in which that agency is listed. The District of Columbia therefore is the appropriate forum for the instant action, and District of Columbia decisions the applicable precedents. See *Matsuo* v. *Dulles*, *infra*, p. 25.

Section 503 of the Nationality Act of 1940, contrary to appellant's contention, was not intended to amend the Declaratory Judgment Act of 1934 by giving a right to sue which had not previously existed. It was intended only to give a right of entry to the United States, and incidentally, to enlarge venue. This is apparent from its language, its legislative history and the adjudicated cases.

We turn first to its language. The section does two things. First, it permits a suit against a government department or agency in the "district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States". This gave a venue right beyond that of the Declaratory Judgment Act of 1934, a suit under which had to be brought in the District of the defendant's residence. 28 U. S. C. § 1391(b). Second, it provided for issuance of a certificate of identity which would enable the claimant to enter the United States pending the outcome of his claim—if he chose to come here.

In the Congressional hearings on this subject, the Government spokesman explicitly assumed that an action for a declaratory judgment existed under the Declaratory Judgment Act. (Hearings before the House Committee on Immigration and Naturalization on H. R. 6127 superseded by H. R. 9980, 76th Cong, 1st Sess., pp. 290, 291, 504, 505). The discussion in the hearings centered about the *pros* and *cons* of the right of entry (Hearings, *supra*, 291-294).

The Government is equally in error in its discussion of the circumstances that led to the replacement of Section 503 of the Nationality Act of 1940 by Section 360 of the Immigration and Nationality Act of 1952. The criticism of Section 503 was not that it permitted suits for declaratory judgment, but that it permitted entries which were fraudulent. At issue was the identity of the entrant, not the bona fides of the cause of action. (Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 716, H. R. 2379 and H. R. 2816, 82nd Cong. 1st Sess., pps.

106-110, 443-445; and see Annual Report of the Attorney General for 1956, pp. 111-113; and for 1957, pp. 121-123).

Section 360 provided for the screening of entrants by the tripartite device of applying for a certificate of entry, applying for admission to the country subject to the procedures governing aliens, and final decision by the Attorney General subject to a habeas corpus proceeding.

Further proof that Section 360 deals with entry and not causes of action is shown conclusively by the fact that it is by its terms "applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent."

This limitation is relevant to the matter of entry, not to a right to sue. Congress, due to the problem of identification of certain citizenship claimants, was unwilling to permit the entry of persons unless they were under the age of sixteen and born abroad of United States parents or, being over the age of sixteen, had at some time been physically present in the United States. But surely it was not Congress's intention, while denying them entry under Section 360, to deprive them, in addition, of any right to sue in our courts.

The legislative history of Section 360 supports the argument herein made. Not a single witness, legislator or committee report suggested that the purpose was to prevent a suit for declaratory judgment. Every authoritative voice, including that of the Deputy Attorney General, Peyton Ford, assumed that the only problem was that of entry. (Joint Hearings, *supra*, pp. 720-721).

Thus, in discussing Section 503, Mr. Ford stated:

> "However, Section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusions," (Joint Hearings, *supra*, p. 720) and

> "The Department of Justice objects to the enactment of Section 360 unless it is amended to provide for the protection of persons abroad who have more than a frivolous claim to citizenship but *who are unable to obtain a United States passport.*" (Joint Hearings, *supra*, p. 721). (Emphasis supplied.)

The Senate subcommittee, reporting the bill, stated:

> "In spite of the definite restrictions on the use and application of Section 503 to bona fide cases, the subcommittee finds that the section has been subject to broad interpretation, and that it has been used in a considerable number of cases, *to gain entry* into the United States where no such right existed." S. Rep. No. 1515, 81st Congress, 2nd Sess. p. 777. (Emphasis supplied.)

and the House Committee stated:

> "The bill modifies section 503 of the Nationality Act, as amended. While it substantially retains the provisions applicable to the person within the United States who is seeking by court action to have his claim to citizenship determined, it *limits the availability of certificate of identity* to [in] the case of the individual abroad who seeks such determination. Persons who have been physically present in the United States, or persons born abroad of United States citizen parents, only, may institute the court action specified and seek identity certificates under the provision of the bill * * *.
>
> "*Admission of a person* presenting this certificate of identity shall be upon such terms and conditions as the Attorney General may prescribe to guarantee the departure or deportation of the subject if his claim to citizenship is denied by the court. *His admission, further, is subject to any restrictions deemed necessary by the Attorney General for the protection and security of the United States.*" (Emphasis supplied.) House Report No. 1365, 82nd Cong., 2nd Sess., pp. 87-88.

Moreover, the General Counsel of the Immigration and Naturalization Service, who assisted in the preparation

of the Immigration and Nationality Act of 1952, confirms the view that the purpose of Section 360 was to limit the use of certificates of identity as a means of gaining entry to the United States. In an analysis of a prior version of the present Section 360, which appeared in S. 716, 82nd Cong., the General Counsel stated:

> "This Section [Section 360 of S. 716] is designed to replace Section 503 of the 1940 Act. Section 503 permits individuals who are denied privileges as nationals of the United States to bring a judicial action to test the legality of such a denial in the same courts specified in the draft. However, Section 503 authorizes a person who is outside the United States to come to this country after filing such a suit in order to prosecute it to a conclusion * * *. *The Service believes that, by limiting the availability of this section to persons within the United States, the bill will remove from the law one method of obtaining easy entry into the United States.*"[3] (Emphasis supplied.)

Hence, the statement of the District Court in *Tom Mung Ngow* v. *Dulles, supra*:

> "* * * It is quite obvious that the purpose of modifying the special remedy prescribed by the Nationality Code of 1940 was to limit and circumscribe the right to procure a certificate of identity, because manifestly it was capable of abuse. An action might well be filed with the ulterior motive of securing a certificate of identity, rather than with a bona fide purpose of obtaining an adjudication of citizenship." 122 F. Supp. 709, 712.

Appellant's brief is significantly silent on the subject of the Administrative Procedure Act which is one of the principal bases of the jurisdiction of the court below. In addition to the jurisdictional provisions (*supra*, page 4), Section 12 of that statute (5 U. S. C., Sec. 1011) passed in 1946, provides that "no subsequent legislation shall

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[3] On file in this Court's library.

be held to supersede or modify the provisions of this chapter except to the extent that such legislation shall do so expressly."

The Act of 1952 is certainly "subsequent legislation" which contains no express supersession or modification of the Administrative Procedure Act. The court below was therefore correct in holding that appellee's rights under the Administrative Procedure Act are unaffected (R. 34, 35).

This Court has given the distinctive legislative provision of Section 12 of the Administrative Procedure Act the full force of its words. See, e.g., *Shaughnessy* v. *Pedreiro*, 349 U. S. 48; *Marcello* v. *Bonds*, 349 U. S. 302, 319; *Brownell* v. *We Shung*, 352 U. S. 180. The significance of Section 12 is illustrated by a comparison of *Heikkila* v. *Barber*, 345 U. S. 229, with *Shaughnessy* v. *Pedreiro*, *supra*. In *Heikkila*, the Administrative Procedure Act was held not to increase an alien's rights under a *prior* immigration law; in *Shaughnessy*, dealing with a substantially similar but *subsequent* statute, the Immigration and Nationality Act of 1952, a contrary result was reached because of Section 12 of the Administrative Procedure Act.

Appellant suggests that the decisions in the District of Columbia may be "contrary to the rulings in several districts" (Br., 38). The cases which he cites in a footnote (Br., 38, note 20) do not support this suggestion. They deal not with the availability of review under the conventional jurisdictional provisions invoked by appellee but only with the availability of the special-privilege review under Section 360.* Since most of the cases were decided by courts outside the District of Columbia, they could not

Sato v. *Dulles*, 183 F. Supp. 306 (D. Hawaii 1958), aff'd per curiam, May 5, 1960 (9th Cir., unreported); *Fusie Yamamoto* v. *Dulles*, 16 F. R. D. 195 (D. Hawaii 1954); and *Avina* v. *Brownell*, 112 F. Supp. 15 (D. D. Tex. 1953), all concerned the question whether a plaintiff denied rights of citizenship before Section 503

concern the present issue, inasmuch as suits under the jurisdictional provisions invoked by appellee can be brought only in the District of Columbia, the official residence of the

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was restricted by Section 360 could secure review after the amendment under the special privilege of the earlier provision. In none of these cases were the courts presented with the question of availability of review under the general jurisdictional provisions.

Strupp v. *Dulles*, 258 F. 2d 622 (2d Cir. 1958); *Harake* v. *Dulles*, 158 F. Supp. 413 (E. D. Mich. 1958); and *Ficano* v. *Dulles*, 151 F. Supp. 650 (E. D. N. Y. 1954); *Vasquez* v. *Brownell*, 113 F. Supp. 722 (W. D. Tex. 1953), all concerned the question whether a person who had entered the country on a foreign passport, or through trickery, was a person "within the country" so as to qualify to sue for a declaratory judgment under Section 360(a). These cases, too, were totally unconcerned with the availability of relief by suit in the District of Columbia under other jurisdictional provisions.

Ferretti v. *Dulles*, 246 F. 2d 544 (2d Cir. 1957), held that a plaintiff could not secure judicial review under any provision when he failed to show that there had ever been final agency action denying him a right of citizenship. The Court did not even reach the question of its jurisdiction under Section 360, much less the question of its or any court's competence under general jurisdictional provisions.

Samaniego v. *Brownell*, 212 F. 2d 891 (5th Cir. 1954), was not concerned with a plaintiff's right to secure judicial review, but solely with his right to secure admission to the United States for the purpose of subsequently filing suit. Plaintiff in the instant case does not seek entry, of course, but only to sue from abroad.

Tang Tun v. *Edsell*, 223 U. S. 673 (1912); *United States* v. *Ju Toy*, 198 U. S. 253 (1905); and *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), referred to on page 25 of appellant's brief, drew a distinction between persons being deported from this country and those excluded from entering, but the distinction determined whether such persons were entitled, as a constitutional matter, to a judicial hearing. The cases have no bearing on the question of statutory jurisdiction at issue in this case.

Matsuo v. *Dulles*, 133 F. Supp. 711 (S. D. Cal. 1955), appears to be the only case outside the District of Columbia in which the Court, finding it lacked jurisdiction under Section 360, proceeded to consider the possibility of jurisdiction under the conventional statutes invoked in the present case. It concluded that such an action "could not be maintained in this district (California)" because "the official residence of the Secretary of State is in the District of Columbia."

Secretary of State. *Dulles* v. *Richter*, 246 F. 2d 709 (1957), and *Wong Kay Suey* v. *Brownell*, 227 F. 2d 41 (1955), cert. denied, 350 U. S. 969, in the District of Columbia, also concerned solely the availability of review under the special-privilege provisions, Sections 503 and 360. Both cases found jurisdiction present under those provisions and thus neither discussed the availability of the relief here requested.

Congress cannot reasonably be regarded as intending such a harsh and novel result in the absence of explicit legislation. See *Tom Mung Ngow* v. *Dulles*, 122 F. Supp. 709, 712 (D. D. C. 1954). In *Puig Jimenez* v. *Glover*, 255 F. 2d 54 (C. A. 1, 1958), the Government also urged that review under Section 360 (b) and (c) was the exclusive remedy to a plaintiff to whom, as in the present case, that proceeding would have been extremely burdensome. The Court, through Chief Judge Magruder, said:

> "The language of the McCarran Act does not require us to impute this absurdity to the Congress of the United States. The Congress must speak with a clear voice before the courts would be justified in putting such an interpretation upon legislation as would have the effect of withdrawing the possibility of judicial review from a claimant to American citizenship which such claimant undoubtedly had the right to pursue under the prior legislation" (255 F. 2d at 57).

A serious constitutional question arises if the statute is construed, as suggested by the Government, to foreclose review. "When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell*

v. *Benson*, 285 U. S. 22, 62. In our view, the appellant's construction of Section 360 so as to deprive the District Court of jurisdiction would make the section unconstitutional. Congress cannot prevent judicial review of the constitutionality of its enactments by attempting to withdraw the jurisdiction of the courts to review such enactment. See *Marbury* v. *Madison*, 1 Cranch, 137.

In *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 52, where Chief Justice Hughes said:

> "The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

See also *Estep* v. *United States*, 327 U. S. 114, 127 (concurring opinion); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U. S. 673, 682.

In the present case, the appellee contends that Section 349(a)(10) of the Immigration and Nationality Act of 1952 is beyond the power of Congress under the Constitution. If that section is vulnerable, Congress could not shield it from attack by withdrawing the general jurisdiction of the District Court to review action under it, by depriving many injured persons of any remedy whatsoever because of the limiting language of Section 360 and by requiring as a condition of access to any court that the appellee attempt to secure a certificate of identity, and if successful, come to the United States in the status of an alien to raise the question. Indeed, a preliminary lawsuit might well be required to secure such a certificate. The Secretary of State has argued that since a certificate is a matter of grace, its denial is not justiciable and some courts have agreed. See *e.g. Wong Fon Haw* v. *Dulles*, 114 F. Supp. 906. But if the certificate

did issue, the entrant, an American citizen by birth, could be held in detention without bond and offered no constitutional guarantee of due process while attempting to vindicate his claim to citizenship. See the treatment accorded an alien in *Shaughnessy* v. *Mezei*, 345 U. S. 205.

The burden thus imposed has no justification whatsoever in terms of expediency in the courts or any other policy of Congress. It would be a burden added for no purpose other than to protect Section 349(a)(10) from the danger of invalidation by making litigation of its validity impossible or extremely difficult. As such, Section 360 itself would plainly be void. In any event, no such purpose should be attributed to the Congress. Section 360 should be construed as Congress intended it, as an aid to persons seeking to litigate their rights as citizens and not as an obstacle to such litigation.

II

Section 349(a)(10) is a penal law not reasonably calculated to aid the war effort and therefore unconstitutional under this Court's decision in *Trop* v. *Dulles*, 356 U. S. 86.

In *Trop* v. *Dulles*, 356 U. S. 86, this Court held that Congress did not have the power to punish wartime desertion by loss of citizenship. The principal opinion was delivered by Chief Justice Warren and joined in by Justices Black, Douglas and Whittaker. A concurring opinion was written by Justice Brennan.

The Chief Justice, speaking for himself and Justices Black and Douglas, first reiterated his position in *Perez* v. *Brownell*, 356 U. S. 44, 62, that it is only the citizen, not the Government, who can terminate citizenship. We adhere

to that principle in the present brief for the reasons given by the Chief Justice. It is not, however, necessary for us to argue that point since, under the reasoning of the majority of this Court in *Trop* v. *Dulles, supra,* it must follow that Section 349(a)(10) is unconstitutional.

The same conclusion follows from Mr. Justice Whittaker's Memorandum in *Perez* v. *Brownell* dissenting on the ground that the citizen's act there involved "cannot reasonably be said to be fraught with danger of embroiling our Government in an international dispute or of embarrassing it in the conduct of foreign affairs nor, I believe, can such an act—entirely legal under the law of a foreign state—be reasonably said to constitute an abandonment or any evasion or dilution of allegiance to the United States" (356 U. S. 44, 84, 85).

In *Trop* v. *Dulles,* Section 401(g) of the Nationality Act of 1940 (now § 349(a)(8) of the Immigration and Nationality Act of 1952) was held by this Court to be a penal law (356 U. S. at 97). This was the view taken in the Chief Justice's opinion, *ibid.*, and by Mr. Justice Brennan in his concurring opinion (356 U. S. at 86).

Four members of the Court declared that "use of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society." 356 U. S. at 101.

Mr. Justice Brennan, in his concurring opinion, concluded that the punishment was unreasonable and, hence, in violation of the Fifth Amendment because of its harshness, the possible result of statelessness and the availability of alternative means of punishment. After pointing out that the history of Section 401(g) shows that it was a "response to the needs of the military in maintaining discipline in the armed forces, especially during wartime", he said

that "we must yet inquire whether expatriation is a means reasonably calculated to achieve this legitimate end and thereby designed to further the ultimate congressional objective—the successful waging of war" (356 U. S. at 107).

Examining the origins of the statute in the Act of 1865, 13 Stat. 487, 490, and the judicial decisions thereunder, Mr. Justice Brennan concluded that the statute "purposed expatriation of the deserter solely as additional punishment", 356 U. S. at 110, and that "Congress's imposition of expatriation • • • [is] a penal device [not] justified is reason", 356 U. S. at 111. For, said the Justice, while there may be some support for Congress's belief that expatriation might further the war effort "any substantial achievement by this device of Congress's legitimate purposes under the war power seems fairly remote", 356 U. S. at 114. Since "these ends could more fully be achieved by alternative methods not open to these objections" (*ibid.*), Mr. Justice Brennan held that:

> "the requisite rational relation between this statute and the war power does not appear—for in this relation the statute is not 'really calculated to effect any of the objects entrusted to the government • • • ', *McCulloch* v. *Maryland*, 4 Wheat. 316, 423—and therefore that § 401(g) falls beyond the domain of Congress." (*ibid.*)

These being the views of the Court with respect to the desertion provision, the same conclusion must follow with respect to the draft evasion provision in view of the common origin and purpose of the two grounds for loss of citizenship. Both sections had their origin in Section 21 of the Act of March 3, 1865, 13 Stat. 487, 490. As Mr. Justice Brennan pointed out:

> "Expatriation of the deserter originated in the Act of 1865, 13 Stat. 490, when wholesale desertion and draft-law violations seriously threatened the effectiveness of the Union armies." (*Trop* v. *Dulles*, 356 U. S. 86, 107)

The Chief Justice's opinion was in complete agreement on the similarity of the two sections although he suggested an additional constitutional objection to the draft evasion section:

> "Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion. It is essentially like Section 401(j) of the Nationality Act, decreeing loss of citizenship for evading the draft by remaining outside the United States. This provision was also before the Court in *Perez*, but the majority declined to consider its validity. While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial." (356 U. S. at 93-94)

Indeed, the Solicitor General has elsewhere recognized the common origin and purpose of the draft evasion and desertion provisions (Govt. Br. in *Perez* v. *Brownell*, *supra*, p. 49):

> "For the most part, the history of Section 401(g) is bound up with Section 401(j), which we have just discussed (*supra*, pp. 40-49). Both provisions stem from the same 1865 Act, and they had the same history until 1940. The 1940 Act continued the desertion provision but omitted the draft-evasion portion.
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> "The reasons which sustain Section 401(j) also apply to the cognate Section 401(g). Desertion in wartime, like draft-evasion, is a repudiation of the highest obligation of citizenship, and involves kindred considerations. Subsection (g) does differ from subsection (j) in that it omits the requirement of flight from this country or foreign residence; but the absence of this factor does not swing the balance against constitutionality * * *."

In the companion case of *Kennedy* v. *Mendoza-Martinez*, No. 19, October Term, 1961, the District Court agreed on

the similarity of the draft evasion and desertion provisions and stated that its views on Section 401(j) "are similar to the views entertained by Mr. Justice Brennan on Section 401(g) in his concurring opinion in *Trop* v. *Dulles.*" *Kennedy* v. *Mendoza-Martinez,* No. 19 Oct. Term 1961, R. p. 12.

Finally, the Court below concluded that there was "no substantial difference between the constitutional issue in the *Trop* case and the one facing us. The court's ruling there is controlling here" (R. 38-39).

Now, in the light of the *Trop* decision, the Government would repudiate its prior assimilation of the draft evasion to the desertion provisions. It seeks to distinguish them on the ground that expatriation in the present case requires "departing from or remaining outside of the jurisdiction of the United States" (Govt. Br. in No. 19, p. 13). From this, it concludes that the draft evasion provision might be related to foreign relations and that the deprivation of citizenship was not intended as punishment. This argument is not supported by the legislative history of the section, by its language, now or earlier, or by the reasoning of this Court in *Perez* v. *Brownell,* 356 U. S. 44. Further, it is inconsistent with the Government's argument elsewhere that "the requirement of flight from this country or foreign residence" is not the constitutional criterion (*supra,* p. 31).

The draft evasion and desertion provisions appear in the identical section of a Civil War statute significantly entitled "An Act to amend the several Acts heretofore passed to provide for the enrolling and calling out the national forces, and for other purposes" (13 Stat. 487, 490, Section 21). Appellant rewrites history in suggesting that the statute had the unstated purpose of protecting deserters and draft evaders from army service in other countries (Govt. Br. in No. 19, pp. 41, 42). The Act of 1865 contains many other provisions relating to the main-

tenance of an army and none relating to the subject of foreign relations; the marginal titles of the very section involved, Section 21, indicates an intention to *punish* desertion.[4] As the Solicitor General has elsewhere stated, the Act of 1865 was "part of an omnibus military measure."[5]

The Government refers to the fact that "[a]merican history is marked by international difficulties flowing from attempts to compel or prevent military service by young men" (Br. in No. 19, p. 41). These difficulties had nothing to do with the instant problem of American draft evaders. They were the result of the insistence of foreign countries upon the military service of naturalized Americans. This led ultimately to the Expatriation Act of 1868, 15 Stat. 223, and to various treaties between the United States and foreign countries. See, *e.g.*, Treaty With the King of Prussia, February 22, 1968, 15 Stat. 615, T. S. No. 261. The Act of 1865, "an omnibus military measure", *supra*, p. 32, has nothing whatsoever to do with this situation.

In 1912, the 1865 statute was modified to apply only to war-time desertion (Act of August 22, 1912, 37 Stat. 356). The House Report stated explicitly that the Act of 1865 had been passed "as a war measure" (H. Rep. 335, 62d Cong. 2d Sess.) and "imposed the further and most drastic punishment of loss of rights of citizenship."[6]

When Congress came to consider the Cabinet Committee's recommendations of 1938,[7] which ultimately led

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[4] The three significant subtitles are "Penalty for desertion, &c", "Rights as citizens forfeited" and "Leaving the country to avoid draft to incur like penalty." 13 Stat. 490, 491.

[5] Supplemental Brief for the Respondents on reargument, p. 14, in *Perez* v. *Brownell*, *supra*.

[6] It also quoted from the Annual Report of the Secretary of the Navy for the year 1912, who described the statute as "a means of enforcing the draft and of preventing desertion * * * a war measure."

[7] See Hearings before the House Committee on Immigration and Nationality, 76th Congress, 1st Sess. on H. R. 6127, *passim*.

to the passage of the Nationality Act of 1940, it is significant that no recommendation was made for the loss of citizenship by draft evaders (Hearings before the House Committee on Immigration and Naturalization, 76th Cong. 1st Sess. on H. R. 6127). If, indeed, this was a substantial problem in our foreign relations going back to the Civil War, it is strange that the Secretary of State, who was represented on the Cabinet Committee, made no such suggestion to the Congress.

It was not until we were at war that the draft evasion provision was restored by an amendment to the Nationality Act of 1940 passed on September 27, 1944 (58 Stat. 746). Section 401(j) was passed upon the recommendation, not of the Secretary of State but of the Attorney General of the United States, its chief law enforcement officer, whose duties included the enforcement of the Selective Service Law (H. Rep. 1229, 78th Cong. 2d Sess.). The Attorney General was silent on the subject of foreign relations, discussed violations of the Selective Service and Training Act of 1940 and the desirability of adding loss of citizenship to the other penalties to persons "not worthy of citizenship" (*ibid.*).

On the floor of the House, Rep. Dickstein of the House Committee on Immigration complimented the Federal Bureau of Investigation for its assistance in connection with this statute (90 Cong. Rec. 3261-2). He described "any American who leaves this country for the purpose of not serving in time of war" as "a traitor" (90 Cong. Rec. 3261). Senator Russell, Chairman of the Senate Immigration Committee, said that persons who "were unwilling to serve their country * * * should be penalized in some measure" (90 Cong. Rec. 7629)*. Hence the Government was quite correct in describing Section 401(j) to this

* Earlier he said, "The Department of Justice is exceedingly anxious that these bills be enacted into law" (90 Cong. Rec. 7628).

Court as a provision which "reinstated, in effect," the Act of 1865. (Brief for respondent, pp. 43, 61 in *Gonzalez* v. *Landon*, 350 U. S. 920).

In 1952 the provision was incorporated, with certain changes, into the Immigration and Nationality Act of 1952 without explanatory debate. It added a provision that "failure to comply with any provision of any compulsory service laws shall raise the presumption that the departure or absence was for the purpose of draft evasion. It is fair to say that the purpose of the 1952 statute is the identical punitive one underlying the Acts of 1865, 1912 and 1944.

The Government's attempts to assimilate this case to *Perez* are unsound since, in that case, a majority of this Court regarded the act of voting as one of possible embarrassment in our foreign relations. Mr. Justice Frankfurter's opinion was that by participating in the electoral processes of the other country the American citizen may "encourage a course of conduct contrary to the interests of his own Government; moreover, the people or government of the foreign country may regard his action to be the action of his Government, or at least as a reflection if not an expression of its policy" (356 U. S. 44, 59). This is, of course, completely inapplicable to the act of "departing or remaining outside of the jurisdiction of the United States" for the purpose of avoiding draft obligations.

The Government argues, however, that because the desertion provisions are based upon departure from the United States, foreign relations might be involved (Br. No. 19, p. 37). This is an argument of forensic ingenuity but is not, however, one based upon the realities of legislative intent or actual danger. That foreign relations is not the reason is shown by the fact that the earlier statute, that of 1865, penalized the draft evader even if he moved into another district, and the current statute refers to departure from the United States rather than to presence in a foreign country. If embarrassment in foreign relations was a concern of Congress, it would have been more rea-

sonable to have the statute read "entering into or remaining in any foreign state." Expatriation, as the statute now reads, could result in going beyond the twelve-mile limit or journeying to ungoverned polar regions where no involvement with foreign relations could be claimed.

The effect of harboring violators of the draft laws is no different from that of harboring violators of other laws. Yet no one has suggested that it would be reasonable or constitutional to denationalize tax evaders, bank robbers, narcotic offenders (see concurring opinion of Justice Brennan in *Trop*, 356 U. S. at 113), persons who obstruct the draft (*cf. Schenck* v. *United States*, 249 U. S. 47), or rum runners (*cf. Ford* v. *United States*, 273 U. S. 593). If foreign relations are affected adversely as a result of harboring fugitives from our laws, the nature of the offense is quite irrelevant.

But even if presence in a foreign country had been made the statutory criterion—as explicit as *e.g.*, voting in a foreign election—that would not meet this Court's test in *Perez, supra*. The draft evader who goes abroad is not engaged in "abandonment or any division or diminution of allegiance to the United States" to use the words of Mr. Justice Whittaker's dissenting Memorandum in *Perez*, 356 U. S. at 88. He has not transferred his allegiance any more than the draft evader who remains within the United States, or the tax evader who goes abroad to avoid a prime obligation of citizenship.

The Government, we think, has missed the essence of this Court's three decisions upholding expatriation laws. In each one of these such cases, *Savorgnan* v. *United States*, 338 U. S. 491 *Mackenzie* v. *Hare*, 239 U. S. 299; *Perez* v. *Brownell*, 356 U. S. 44, the person involved had another nationality.[9] The question in each case was whether the

[9] While the petitioner in *Perez* v. *Brownell*, 356 U. S. 46, was a United States citizen by birth, we assume, as does the appellant, Br. No. 19, p. 41, that he was a dual national since neither the opinion nor the briefs raise the issue of statelessness.

act, whether of marriage, oath of allegiance, or voting, indicated a choice of the other nationality and in the one case, the possible attribution to the United States of an interference in the internal affairs of another nation by the voting of its national. This is clearly not such a case.

In truth, there is nothing in our political history to show that such fugitives—and particularly those who desert or avoid the draft—have impaired our foreign relations. Had that been the case, Congress could have solved the problem by entering into appropriate treaties.

This is the first case in which, if the appellant were upheld, an American citizen would be rendered stateless. Before so radical a step is taken by this Court, we respectfully urge it to consider the entire history of Anglo-American law as to the nature of citizenship and the practical, legal and modal effects of statelessness. It is significant that the British Government has never asserted the right to deprive a British subject by birth of his nationality. Jones, *British Nationality Law*, 167 (rev. ed. 1956). See also, Hall, *Foreign Powers and Jurisdiction of the British* Crown, 44-45 (1894).[10]

But the effect of rendering an American citizen stateless is so drastic that, we submit, it can only be done by a constitutional amendment.

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[10] The state does have wide power in England to revoke naturalization. Jones, *op. cit. supra*, at 167-68. The distinction between native-born and naturalized subjects is quite obvious from the literature. See McNair, *British Nationality and Alien Status in Time of War*, 35 L. Q. Rev. 213, 217 (1919) (referring only to revocation of naturalization); 2 Anson, Law and Custom of the Constitution pt. I at 290-91. This has no bearing upon our problem in view of the equality of treatment required by the Fourteenth Amendment. See *United States* v. *Wong Kim Ark*, 169 U. S. 649.

First, it would eliminate the individual from any meaningful connection with organized society. "[I]t excommunicates him and makes him, literally, an outcast". Mr. Justice Brennan, in *Trop* v. *Dulles*, 356 U. S. 86, 111. In *Schneiderman* v. *United States*, 320 U. S. 118, 122, the Court said of the loss of citizenship:

> "• • • In its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty. For it is safe to assert that nowhere in the world is the right of citizenship of greater worth to an individual that it is in this country. It would be difficult to exaggerate its value and importance."

Second, it would subject him to the many disabilities of aliens in the United States. *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (deportation policy almost solely within Congressional discretion); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206 (power to exclude includes power to detain stateless alien indefinitely); *Carlson* v. *Landon*, 342 U. S. 524 (discretionary refusal of attorney general to grant bail not reviewable unless arbitrary).

Third, most seriously, it would permit the monstrous punishment of banishment from one's native soil. "True exile is unknown • • •" in England, said Pollock and Maitland, *History of English Law*, 518 (2nd ed. 1898). Similarly, 1 Blackstone, Commentaries at 137. Is not that equally true in the United States?

Finally, it would destroy his rights in the field of international relations which are dependent upon a protecting nation. Judge Lauterpacht, of the International Court of Justice, took a realistic approach to the concept of citizenship when he wrote that it is "an instrument for securing the rights of the individual in the national and international sphere", rather than "a privilege • • • conferred by the State." Lauterpacht, Foreword to Weis, *Nationality and Statelessness in International Law*, at xi (1956). Such an approach recognizes that "citizenship" is merely a short-

hand expression for the manifold rights which it represents. It also suggests the increasing necessity that every man have a nationality.

The right of every individual to have a nationality was asserted long before statelessness became the serious problem it is today. See *e.g.*, Cicero, *Pro Balbo* II-27-28; *De Domo Sua* 29.77 (Watts transl. 1935); and Salmond, *Citizenship and Allegiance*, 17 L. Q. Rev. 270, 277 (1901). It is reflected in David Dudley Field's early draft of an International Code. Field, *Outlines of an International Code*, § 248 (2d ed. 1876). The International Law Association meeting in 1924 urged that "nationality should only be lost as the effect of the acquisition of another nationality."[11] As the problem of statelessness increased, it became the subject of repeated studies and resolutions of international conventions.[12] Recent investigations by the United Nations and others these past several years have taught us the seriousness of the problems created by hundreds of thousands of refugees without the right to a national residence and a national state to protect them.[13] Consequently, it is increasingly recognized by scholars that, national constitutions asde, a state may not be entirely free to denationalize and hat its actions may constitute an *abus de droit*.[14]

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[11] Resolution No. 4, 34th Conf. (1924) in *International Law Ass'n, Transactions*, 1873-1924, at 80 (1925).

[12] See *League of Nations Pub. Nos. C. 224.M.111.1930V*; C.26.M.15.1931V; *U.N. Doc. No. E/Conf. 17/5Red. 1* (1954); *U. N. Convention Relating to the Status of Refugees*, Geneva, July 28, 1951, *CMD. No.* 9171 (T. S. No. 39 of 1954).

[13] *U.N. Doc. No. A/CN.4/50* (1952); *U.N. Doc. No. E/1112, & E/1112/Add.1* (1949); *U.N. Doc. No. E/Conf./17/5* (1954); See also Simpson, *The Refugee Problem* (1939).

[14] Weis, *Nationality and Statelessness in International Law*, *supra*, at 51.

We believe the American constitutional system to be the one least consistent with the principle of involuntary denationalization. The political ideas which most influenced the drafters of the Declaration of Independence and of the federal and early state constitutions [15] were the social-compact theory of Locke,[16] the doctrine of natural rights,[17] and the concept that the people are sovereign under a government of limited powers.[18] These principles were reflected in the state constitutions, the Declaration of Independence, and the Constitution itself. They find support in the provisions of the Bill of Rights and even in the statements of those who argued that a Bill of Rights was unnecessary.[19] The ninth and tenth amendments contain the most explicit statements of the sovereignty of the people ever to appear in a national constitution.

We respectfully submit that a Constitution so conceived cannot be fairly construed so as to authorize a Government of limited powers to deprive a native born citizen of all meaningful status, to render him stateless and to banish him from the country of his birth.

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[15] Becker, *Freedom and Responsibility in the American Way of Life* 13-16, 68-70 (1954); Parrington, *The Colonial Mind* 188-90 (1927); Rossiter, *Seedtime of the Republic* 439 (1953); Wright, *American Interpretations of Natural Law passim* (1931).

[16] Locke, *Second Treatise of Civil Government* § 135 (1690). Compare I BLACKSTONE, *Commentaries* * 125, Otis, *The Rights of the British Colonies Asserted and Proved* (2d ed. 1765).

[17] See generally Gierke, *Natural Law and the Theory of Society* (Barker transl. 1934).

[18] Becker, *supra* note 15.

[19] Hofstadter, *The American Political Tradition* (1949).

III

Section 349(a)(10) denies due process of law in that it permits adjudication of loss of citizenship by an administrative agency.

The constitutional defect existing in the draft evasion provision of the statute involved herein, in contrast to the desertion provision involved in *Trop*, is best set forth in the Chief Justice's opinion in that case:

> "• • • • While Section 401(j) decrees loss of citizenship without providing any semblance of procedural due process whereby the guilt of the draft evader may be determined before the sanction is imposed, Section 401(g), the provision in this case, accords the accused deserter at least the safeguards of an adjudication of guilt by a court-martial." 356 U. S. at 94.

It will be recalled that in the case of a deserter, the Act of 1865 did not in terms provide for the loss of citizenship or "citizenship rights" in the absence of a trial before a court or a court-martial. In *Huber* v. *Reilly*, 53 Pa. State 112, the Court read that provision of the Act of 1865 in conjunction with other statutes so as to require a trial and conviction upon the charge of desertion as a condition precedent to expatriation. It did this upon the basis of constitutional considerations which, in its view, would otherwise have made the statute unconstitutional:

> "• • • • But I can call to mind no instance in which it has been held that the ascertainment of guilt of a public offense and the imposition of legal penalties, can be in any other mode than by trial according to the law of the land or due process of law, that is, the law of the particular case, administered by a judicial tribunal authorized to adjudicate upon it." *Id.* at 117.

This construction of the 1865 Act was approved by the Supreme Court in *Kurtz* v. *Moffitt*, 115 U. S. 487. The history of this is set forth in Mr. Justice Brennan's concurring opinion in *Trop* v. *Dulles*, 356 U. S. at pp. 107-19.

If due process requires that a deserter be convicted before he may be denationalized, the same is required in the case of a draft evader. The Government's brief in *Mackey* v. *Mendoza-Martinez* states that "there is no violation of due process" but it fails to comment in this connection upon *Huber* v. *Reilly*, *Kurtz* v. *Moffitt* or upon the opinions of the Chief Justice and Justice Brennan in *Trop*.

Instead, the Government argued in the *Mackey* case that the appellant is entitled to a "de novo trial" (Br. No. 19, p. 31) in which the Government has the burden of proof.[20] This hardly meets the problem since appellee has already been deprived by an administrative agency's decision of his citizenship and of the privileges of citizenship, including the right to a passport. Hence, this formulation in the Government's summary of argument: "Citizenship cannot be forfeited administratively under Section 401(j) *in any final sense*" (Br. No. 19, p. 14). Emphasis supplied.

In *Mackey* v. *Mendoza-Martinez*, the Government seeks to enhance the alien's position by arguing that he "is entitled to bring a declaratory judgment to establish his citizenship" (Brief, p. 31). In the instant case, the Government denies that appellee has an equal right and would have him enter as an alien and subject to all of the problems of such entrance under the Immigration and Nationality Act of 1952. However, regardless of the problem of ultimate remedy, the fact is that a decision made by a government department and not by a court—has stripped appellee of his citizenship and the benefits thereof.

The basic principle of law was stated many years ago by Mr. Justice Brandeis in *Ng Fung Ho* v. *White*, 259 U. S. 276, 284-285:

> "To deport one who so claims to be a citizen, obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S. 8, 13. It may

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[20] In the instant case, the Government does not concede that appellee is entitled to "a judicial trial *de novo*" (see Br. p. 47).

> result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare United States v. Woo Jan, 245 U. S. 552, 556; White v. Chin Fong, 253 U. S. 90, 93."

Appellant's argument that this rule "obviously does not apply here since appellee remains abroad" (Br., p. 9), is not very illuminating. Appellee is not a person seeking entrance into the United States who, the appellant says, was never a citizen. In this case, it is the appellant who has the burden of showing that appellee's citizenship by birth has been lost by certain conduct. Nor are we dealing here with mere property rights. The deprivation involved in the present case is one of citizenship. Its effect is statelessness. If any situation exists in which a judicial determination must precede an adjudication of loss of rights, this is such a case.

IV

Section 349(a)(10), as written and applied, denies due process of law by reason of its vagueness and by its creation of a presumption of unlawful purpose in remaining abroad from "failure to comply with any provision of any compulsory service laws of the United States."

Appellee has been indicted by a grand jury in the District of Massachusetts, on the ground that he had failed to comply with his duties under the Selective Service Law "and the rules and regulations made thereunder" by not reporting for induction (R. 75). There has been no trial as yet under this indictment. Indeed, one of the purposes of this litiga-

tion was to permit appellee to meet the charges either by trial or other disposal of the indictment which would include reporting for induction and other compliance with the Selective Service Laws (R. 76-85). Despite the fact that a jury has never tried the appellee, the appellant has made an adjudication pursuant to Section 349(a)(10) of the 1952 Act that appellee has violated these laws and further that he remained abroad for that purpose. This determination was made by the administrative agency upon the basis of the presumption set forth in Section 349(a)(10) of the 1952 Act (R. 106), reading as follows:

> "For the purposes of this paragraph failure to comply with any provision of any compulsory service laws of the United States shall raise the presumption that the departure from or absence from the United States was for the purpose of evading or avoiding training and service in the military, air, or naval forces of the United States."

The District Court, without specifying this presumption, upheld this determination (R. 32), stating that "We are convinced that his purpose was to avoid service in the armed forces" (R. 36). The appellee does not believe that, upon the basis of the present record, the court's being "convinced" was the equivalent of the clear and convincing evidence rule established by this Court in *Nishikawa* v. *Dulles*, 356 U. S. 129. The court below, as well as the administrative agency, was relying upon an inference drawn from the fact that the appellee had at one time indicated a desire to return to the United States to resume his teaching of medicine. The court disregarded the appellee's sworn statement, whose credibility was confirmed by the American Consul in Prague, that while the appellee may have remained abroad in the face of a selective service order, his reasons for remaining abroad were very different (54, 89). To the extent that the Government is aided by the presumption in Section 349(a)(10), we submit that the statute is unconstitutional because there is "no rational con-

nection between the fact proved and the ultimate fact presumed."

In *Tot* v. *United States*, 319 U. S. 463, 467 (1943), this Court held:

> "* * * a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.* * *"

The absence of a rational connection is highlighted by three factors: (1) the presumption operates with respect both to departure and absence; (2) it arises upon a failure to comply with "any" provision of "any" compulsory service laws; and (3) it exists despite the burden of proof required by the Constitution.

(1) Assuming the reasonableness of any presumption in the case of so affirmative an act as an unexplained departure, such reasonableness would not follow in the case of one who like the appellee made no change in the *status quo*.

(2) However, the more serious defect, as we see it, lies in the indifference of the statute to the kind of "failure to comply". There are hundreds of obligations as to which there may be a failure to comply, including the most routine ones of failure to indicate a change of local address or the failure to fill out a particular form. Surely every one of these technical and insignificant violations of law cannot be said to have a rational connection with the ultimate conclusion of remaining abroad for the purpose of avoiding military obligation.

(3) The presumption becomes even more unreasonable in view of the standard of proof constitutionally required in expatriation cases. *Gonzales* v. *Landon*, 350 U. S. 920. In addition, the Government correctly points out that it must show that "the dominant or primary motive in leaving or

remaining away has been to avoid military service." * (Br. in No. 19, p. 59.)

There is, however, a more fundamental objection to the statute on the ground of vagueness. First, it nowhere states what tribunal is authorized to decide whether a citizen has lost his nationality by certain criminal conduct. There can be nothing more serious constitutionally than vagueness in the name of the tribunal authorized to make decisions affecting liberty and property.

Secondly, there is vagueness as to what constitutes the offense of departing or remaining away "for the purpose of evading or avoiding training and service"; equally vague is what constitutes a "failure to comply with any provision of any compulsory service laws" which includes of course the Selective service regulations.

We do not think that either the appellant or the District Court was in a position to determine competently on the basis of standards of criminal justice that the law was violated. What were the regulations of the selective service board which were violated? What were the particular acts of the appellee which constituted that violation? Did the appellee have any legitimate reasons for not responding to the order of the selective service board which might have rendered that order or its enforcement invalid? Some of these are suggested by the complaint in this action where the appellee stated his belief "that the induction order was not issued in good faith to secure his military services, that his past political associations and present physical disabilities made him ineligible for such service, and that he was being ordered to report back to the United States to be served with a Congressional committee subpoena or indicted under the Smith Act (54 Stat. 670, 18 U. S. C. § 2385)." (R. 213).

* Brief in *Mackey* v. *Mendoza-Martinez*, *supra*, p. 39, and administrative and judicial decisions cited pp. 39-41.

In the event of a criminal trial under the indictment, it is, of course, conceivable that appellee may be acquitted either on the basis of the defenses indicated above or for other reasons of a technical or substantive nature. How, under these circumstances, could the determination of loss of nationality made in the instant case remain?

CONCLUSION

This case presents to the Court one of the most fundamental issues in our constitutional system; the relationship between the citizen and his government. Only an affirmance of the judgment below is consistent with this Court's declarations in its earliest decisions that ours is a government of enumerated powers in which the people are sovereign. A contrary decision would change a constitutional system of voluntary transfer of nationality to one of involuntary denationalization and statelessness as punishment for crime. It would disregard the fully argued and considered decisions of this Court made only four Terms ago. We urge that in a period of world history when the individual is increasingly in danger of submergence in the face of state domination, this Court safeguard the rights of our citizens to maintain so fundamental a status, liberty and right as American citizenship.

It is, therefore, respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

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